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# The Investment Protection Rules of the EU-Canada Trade Agreement

## *Emulating the Rule of Law or Still Granting Supersized Protection to Investors? A Case Study on Industrial Mining in Finland*

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### Abstract

This article provides an in-depth analysis of the substantive protection provided to investors against indirect expropriations under the EU-Canada Free Trade Agreement (CETA) and under the Constitution of Finland. More specifically, we analyse these respective spheres of protection in a specific regulatory context: industrial mining in Finland. The purpose of the comparative analysis is to provide tentative answers to three broad research questions: Can investors challenge legitimate public interest measures under CETA's investment protection rules? Is the protection provided under CETA co-extensive with the protection provided under the constitutions of countries placing high on global rule of law rankings? And are countries upholding the rule of law safe from investor claims under CETA's reformed investment protection rules? A more general purpose is to bring more depth and nuance into the debates concerning the reform of the investment treaty regime, which often travel at a high level of abstraction.

### Keywords

international investment law – CETA – indirect expropriation – environmental protection

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## 1 Introduction

The investment treaty regime is changing in response to the diverse criticisms leveled against it. The EU Commission is spearheading the most ambitious reform proposal by advocating the establishment of a multilateral investment court in the ongoing UNCITRAL discussions.[1] That proposal has already been included (to a large extent) in the investment protection rules of the EU-Canada trade agreement (CETA),[2] which will create a two-tier investment court system whose members are appointed for a five-year term.[3] In addition to institutional reform, CETA's investment protection rules contain more precisely defined investment protection standards and the rules also reaffirm the right of the parties "to regulate within their territories to achieve legitimate policy objectives".[4] Taken together, these reforms purport to prevent investors from challenging legitimate regulatory measures adopted in sensitive areas of public policy, such as protection of the environment and public health.

This article analyses the contents of CETA's substantive investment protection rules so as to provide some initial reflections on the central sales pitch which the EU Commission has used to advocate them: namely, that the rules ensure "a high level of protection for investors while fully preserving the right of governments to regulate and pursue legitimate public policy objectives such as the protection of health, safety, or the environment".[5] More specifically, we are interested in exploring to what extent and under what conditions legitimate public interest measures might still be subject to challenge under CETA's investment protection rules. To our knowledge, there are only few article-length contributions that analyse CETA's rules to assess whether they succeed in plugging the perceived loopholes of traditional investment protection

1 *See* <uncitral.un.org/en/working_groups/3/investor-state>, visited on 3 May 2021.

2 Officially Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, pp. 23–1079.

3 At the time of writing (May 2021), 16 EU member states have ratified CETA (the figure includes the United Kingdom). While CETA has been provisionally applied since September 2017, the investment chapter will only be applied once the treaty enters into force, and this requires ratification by all EU member states. For CETA's ratification status, *see* <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017>, visited on 4 May 2021.

4 CETA, *supra* note 2, Article 8.9.1.

5 EU Commission, *Investment Provisions in the EU-Canada Free Trade Agreement* (CETA), February 2016, <trade.ec.europa.eu/doclib/docs/2013/november/tradoc 151918.pdf>, visited on 5 May 2021.

standards, but these are highly general analyses which only scratch the surface of the question we are interested in.[6]

Answering the question may seem a complex task. To begin with, "legitimate" itself is a highly elusive term, often used by political actors to ignore, downplay or dismiss the interests of their political opponents and of their constituencies in debates concerning divisive policy issues.[7] This implies that legitimate interests come in many shapes and forms. Foreign investors are just one group of actors which seeks recognition for its interests in domestic law and politics, alongside other public and private interest groups. Hence, one might say that legitimacy is in large measure in the eye of the beholder, with a broad range of cultural, economic, moral and religious preferences shaping the perception individuals have over the legitimacy of particular policy measures. While we acknowledge this basic ambiguity, our approach to legitimacy in this article is quite straightforward: we consider the domestic measures discussed in the following sections to be legitimate if and when they are adopted in a transparent and rule-based process by a parliamentary majority. Informed by this understanding of legitimacy, we focus on a specific regulatory context – industrial mining in Finland – to assess whether CETA's investment chapter could provide ground for compensation claims both when mining related legislation is reformed and when authorities regulate individual mining projects.

Choosing Finland as a case study is useful for at least four reasons. First, Finland is a mineral-rich country, with over 10 per cent of the country's surface area (approximately 41,000 km$^2$) covered by mining companies' reservation notifications,[8] and where several Canadian mining companies own and

6 C. Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP', 19:1 *Journal of International Economic Law* (2016) pp. 27–50; U. Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT', 15:3–4 *Journal of World Investment & Trade* (2014) pp. 454–483. *See also* T. Dietz, M. Dotzauer and E. Cohen, 'The Legitimacy Crisis of Investor-state Arbitration and the New EU Investment Court System', 26:4 *Review of International Political Economy* (2019) pp. 749–772.

7 For a conceptual discussion on legitimacy in the context of international investment law, *see* A. Galán, 'The Quest for Legitimacy in International Law: The Case of the Investment Regime', 43:1 *Fordham International Law Journal* (2019) pp. 81–125.

8 A reservation notification is a formality, which gives the preserving company priority rights to apply first for an exploration and then a mining permit. See Section 34 of the Mining Act (621/2011). English translations of the Mining Act and other laws referred to in this article are available in the Finlex database, <www.finlex.fi/en/>, visited on 3 May 2021. Not all reservations lead to exploration permit applications, with a government expert estimating that only one exploration permit in thousand lead to a mining permit application. *See* 'Kaivosyhtiöt ovat tehneet varauksia jopa luonnonsuojelualueille', *Yle News*, 30 November 2020 <https://yle.fi/uutiset/3-11657568> visited on 3 May 2021. For general information on

operate[9] or explore and plan new mines.[10] Finland is currently looking for new investors to help build a new industry around electric-vehicle batteries, which will most likely attract Canadian mining companies. At the same time, the mining industry is facing local and national opposition due to several environmental disasters caused by mining activities. These cases brought the industry to public attention and gave impetus to the pending reform of Finland's mining legislation.[11]

Second, Finland places consistently high on various rule of law -rankings,[12] and also placed second in the Fraser Institute's 2019 mining investment attractiveness index, which ranks countries by evaluating their geological appeal and a range of policy factors, such as environmental regulations, taxation, infrastructure and political stability.[13] Third, there is a widespread perception

mining in Finland, *see* Terho Liikamaa, 'Review of mining authority on exploration and mining industry in Finland in 2020', *Finnish Safety and Chemicals Agency*, 26 March 2021.

9 For example, Europe's largest gold mine in Kittilä is owned by the Canadian company Agnico Eagle Mines Limited; the Raahe gold mine, which will start operating in 2021, is owned by Canadian Otso Gold Corp; and the Pyhäsalmi mine is owned by Canadian First Quantum Minerals. The Pahtavaara gold mine is also partially owned by Agnico Eagle Mines. For information on these and other mines (in Finnish), *see* the register of the Geological Survey of Finland, a public institute, which contains information on mining companies as well, <http://gtkdata.gtk.fi/kaivosrekisteri/>, visited on 3 May 2021.

10 Canadian companies Aurion Resources, Palladium One, Mawson Gold Limited, and Rupert Resources Explores are currently making explorations in Finland. *See e.g.* M. Björkman, 'Palladium One to step up its exploration in large areas in Finland', *miningmetalnews.com* (15 September 2019), <https://www.miningmetalnews.com/20190915/1293/palladium-one-step-its-exploration-large-areas-finland>, visited on 14 April 2021.

11 In particular, the environmental degradation caused by the Talvivaara mine in the early 2010s negatively affected public perceptions of mining in Finland. For a summary of the events at the Talvivaara mine, see EJOLT, 'Talvivaara Mine Environmental Disaster', *EJOLT Fact Sheet No. 37* (23 July 2015). Another relevant example is the Hitura nickel mine, which was operated by Belvedere Mining, a Canadian mining company, and which went bankrupt and left behind environmental damage at the mine's site. The Finnish government estimated that it needs to spend EUR five million to close the mine and clean the environment. *See* Mikko Niemelä, 'Kanadalainen kaivosyhtiö konkurssiin Nivalassa – jätti jälkeensä saasteet ja miljoonien laskun veronmaksajille', *Suomen Kuvalehti* (19 May 2017), <https://suomenkuvalehti.fi/jutut/kotimaa/kanadalainen-kaivosyhtio-konkurssiin-nivalassa-jatti-jalkeensa-saasteet-ja-miljoonien-laskun-veronmaksajille/>, visited on 14 April 2021.

12 For example, Finland placed third on the 2020 Global Rule of Law Index of the Global Justice Project, <worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>, visited on 28 April 2021.

13 A. Stedman, J. Yunis and E. Aliakbari, *Fraser Institute Annual Survey of Mining Companies 2019* (Fraser Institute, 2020), <www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2019>, visited on 28 April 2021.

that countries such as Finland are safe from investor claims because its three branches of government operate in accordance with due process and on the basis of pre-established rules of law.[14] Fourth, a related perception is that CETA's investment protection rules merely emulate constitutional principles prevailing in countries upholding the rule of law, without granting more extensive rights to foreign investors. These two perceptions undergirded a 2018 study, commissioned by the Finnish government, which came to the twin-conclusion that CETA's investment protection rules impose no obstacles to the development of mining legislation nor necessitate any legislative reforms. In other words, the authors of the report saw that CETA provides similar type of protection as the Finnish Constitution's Section on the protection of property, implying that compensation claims by Canadian mining companies are highly unlikely.[15]

Above we noted that we seek to understand whether investors are able to bring claims against legitimate public interest measures. We also seek to test whether these two rule of law perceptions hold water, so as to provide provisional answers to two additional questions: Is the protection provided under CETA's investment protection rules co-extensive with the protection provided under the constitutions of countries placing high on global rule of law rankings? And are countries upholding the rule of law safe from investor claims under CETA? A perceptive reader may notice directly that answering these three questions cannot be based solely on an analysis of CETA's relevant rules. What is also required is an understanding of the scope of property protection as provided under the Constitution of Finland, and this is exactly what we will do in the following sections: provide a comparative analysis of the respective scopes of protection available to investors. What assists in answering these three questions is the fact that the Mining Act and other laws relevant to mining are undergoing reform, with a working group expected to produce a draft bill by the end of 2021.[16] The reform is based on the broad objectives outlined

14 As an ISDS advocacy group put it, "countries that enact laws and regulations with due process and that respect the rule of law have nothing to fear from international arbitration as their acts are not likely to be challenged". *See* European Federation for Investment Law and Arbitration, *A Response to the Criticism against ISDS*, 17 May 2015, para. 9.3. <https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf>, visited on 4 May 2021.

15 Borenius Attorneys Ltd, *Selvitys CETA-sopimuksen mahdollisesti aiheuttamista muutostarpeista kaivoslakiin*, August 2018 (on file with the authors).

16 The other relevant laws are the Land Use and Building Act (132/1999), the Nature Conservation Act (1096/1996) and the Environmental Protection Act (527/2014). The working group leading the reform has a website where *e.g.* the minutes of its meetings are published, <tem.fi/kaivoslakiuudistus>, visited 5 May 2021.

in the current government's programme, which include improving environmental protection, assessing whether to introduce a mining tax and streamlining the permitting process.[17] We will base our analysis on a number of concrete reform proposals referred to in the government's programme and discussed in the public domain, which allows making more plausible and relevant conclusions vis-à-vis our research questions.

Generally, should the analysis indicate that CETA and the Finnish Constitution are more or less coextensive in terms of the protections they provide in this specific regulatory context, this would provide tentative support to the Commission's sales pitch for CETA, namely, that its rules merely seek to ensure that states adhere to basic constitutional principles concerning the protection of property, without granting "supersized" legal privileges to foreign investors.[18] Conversely, an opposite conclusion would highlight the need for continued debate over the EU's approach to investment arbitration and over the merits of the justifications given in relation to CETA's investment protection rules.[19] Our analysis also has broader relevance in that identical investment protection rules are included in the agreements the EU has negotiated with Singapore, Vietnam and Mexico and CETA's rules form the basis of the EU's all on-going investment negotiations.

We acknowledge that inferring answers to the three research questions from a single regulatory context might seem far-fetched. It is evident that standards of public law review differ between countries, with, for example, domestic courts showing varying degrees of deference to policy and regulatory measures. Yet there are also similarities between the standards of review across countries, particularly in Europe. For example, the Tort Liability Act,[20] which sets the conditions for public lability for damages in Finland, was the result

17 *See* Programme of Sanna Marin's government, *Osallistava ja osaava Suomi – sosiaalisesti, taloudellisesti ja ekologisesti kestävä yhteiskunta*, 10 December 2019, pp. 27, 45–46. The reform is also based on a parliamentary communication concerning a citizen's initiative on the Mining Act's reform. *See* Parliamentary communication, EK 40/2020 vp, 15 October 2020.

18 *See e.g.*, EU Commission, *supra* note 5, p. 4 (CETA enshrines "fundamental principles such as non-discrimination … [and] expropriation only for a public purpose and against adequate compensation."; EU Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', press release, 29 February 2016 (quoting Frans Timmermans: under CETA "investment disputes will be adjudicated in full accordance with the rule of law.").

19 For information on the EU Commission's Multilateral Investment Court -project, see *EU Commission*, 'The Multilateral Investment Court Project', Brussels, 21 December 2016 (updated January 2021), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>, last visited on 3 May 2021.

20 Tort Liability Act (412/1974).

of pan-Nordic cooperation, and the jurisprudence of the European Court of Human Rights (ECtHR) has homogenized aspects of public law review in the 47 states which are parties to the European Human Rights Convention (ECHR).[21] Hence, while our scope is quite limited, we see the discussion as *potentially* having more general relevance and as providing a starting point for further research seeking to understand the implications of CETA's investment protection rules and of the EU's approach to reform more generally.

Since our goal is to provide an in-depth analysis of these three questions and of the applicable legal rules, the analysis is published in two separate articles. This article will focus on CETA's indirect expropriation provision and on the parameters of indirect expropriation under the Constitution of Finland (as developed in the practice of the Constitutional Law Committee of the Parliament of Finland). We will look at these protections through the lens of three reform proposals referred to in the government's programme, and these are: restricting/prohibiting mining in and close to nature conservation areas; increasing collateral payments; and introducing a mining tax.[22] The second article will focus on the regulation of individual mining projects, in particular on the circumstances under which regulatory decisions concerning individual mines could make the government liable to pay compensation under CETA and under domestic law.

One general limitation that deserves mentioning up-front is that our analysis excludes discussion on the ways in which CETA's investment protection rules (and the so-called "trade plus" agreements in which investment protection rules are just one part) might affect policymaking in the "Global South" or in countries struggling with endemic corruption and bad governance more generally.[23] Such discussion is clearly important and necessary but outside our scope.

The article proceeds as follows. The following section provides a short overview of investment disputes in the mining sector and legal reform in Finland. The third section looks at the three reform proposals concerning

21 General works discussing constitutional review of legislation from a comparative perspective include A. Brewer Carlas, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Oxford University Press, 2011) and M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing, 2013).

22 Government programme, *supra* note 17, pp. 27 and 46.

23 For a highly useful general discussion on this, see N. Tzouvala, "The Academic Debate about Mega-regionals and International Lawyers: Legalism as Critique?" 6 *London Review of International Law* (2018), pp. 189–209. See also F. Morosini, M. Ratton Sanchez Badin (eds), *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press, 2017).

Finland's mining legislation and how such reforms might be assessed under the Constitution of Finland, on the one hand, and under CETA, on the other hand. The fourth section rounds up the discussion and makes some general conclusions.

## 2 Mining Sector Disputes and Legal Reform in Finland

In 2016,[24] the Colombian Constitutional Court rendered a decision which prohibited industrial mining in high-altitude ecosystems known as *páramos*, which are vital sources of Colombia's freshwater supply.[25] The decision effectively halted a number of foreign-owned mining projects located in the *páramos*, including projects owned by Canadian investors. As a consequence, three Canadian investors have brought claims against Colombia under the investment protection provisions of the Canada-Colombia Free Trade Agreement, alleging that the Court's decision destroyed the value of their investments and amounts to an indirect expropriation.[26] For example, one of the companies argues that it had invested over USD 250 million to a project located in and around the *Santurban páramo*, with the Court's ruling depriving it of any return on its investment. In a similar type of case pending between a Panamanian investor and Spain, the investor claims that it spent over USD 35 million on a gold mine project before its exploitation concessions were unlawfully terminated by the regional government.[27] In a third case, a US investor is claiming that a 2011 law, which revoked a number of exploration licenses located in the St. Lawrence River in Quebec, *de facto* expropriated the investment it had in the exploration licenses through a Canadian subsidiary. The 2011 law was based on scientific research on the environmental impact of exploration and exploitation activities on the river's ecosystems, with Canada arguing

24 The judgment is available in Spanish at <https://www.corteconstitucional.gov.co/relatoria/2016/c-035-16.htm>, visited on 4 May 2021.

25 For an insightful discussion on the broader context of the disputes, *see* L. Cotula, 'Investment disputes from below: whose rights matter? Mining, environment and livelihoods in Colombia', *IIED blog post*, 23 July 2020 <https://www.iied.org/investment-disputes-below-whose-rights-matter>, visited on 4 May 2021.

26 *Galway Gold Inc.* v. *Republic of Colombia*, ICSID Case No. ARB/18/13; *Red Eagle* v. *Republic of Colombia*, ICSID Case No. ARB/16/41.

27 *Corcoesto* v. *Kingdom of Spain*, PCA Case No. 2016–26. *See* the claimant investor's news release, 'Edgewater responds to Galician government statements concerning its mining concessions at the Corgoesto gold project, Spain', 21 October 2015, <www.edgewaterx.com/NewsReleases.asp?ReportID=726800>, visited on 3 May 2021.

that the law is a legitimate and non-discriminatory public interest measure, the sole purpose of which is to protect the river's fragile ecosystem.[28]

While the factual record of these cases is no doubt more complex than these short remarks suggest, the cases demonstrate that investment disputes in the mining sector often stem from measures that put a stop to early-stage investments to which investors may have sunk considerable amounts of capital. Another general observation is that the domestic legality (or constitutionality) of a measure is not a decisive issue in investment arbitration. A state organ may act in full compliance with the domestic constitution, but still breach an investment protection standard of an investment treaty.[29] This merely reflects the basic principle of the law of treaties – namely, that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[30]

Generally, some of the reform objectives and proposals discussed in Finland resemble the grounds of action in these investment disputes. For example, restricting or prohibiting mining in and close to nature conservation areas might lead to indirect expropriation claims on the part of the concerned mining companies, on the assumption that such prohibition extends to companies which have already invested capital in exploration. Such reform would effectively prevent the concerned investors from applying for permits necessary to construct and operate a mine (and thereby prevent the investors from getting any return on their investments). Similarly, increasing collateral payments could have severe economic consequences to mining companies struggling with profitability. While none of the reform proposals/objectives seek to expropriate property rights related to mining, they clearly affect the value of such rights. The question then is how such and similar proposals would be

28 *Lone Pine Resources* v. *Canada*, ICSID Case No. UNCT/15/2. For information on Canada's position concerning the case, *see* at <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng>, visited on 5 May 2021.

29 For example, in the *BG Group* v. *Argentina* arbitration, Argentina argued that the contested measure was compatible with "legal emergency criteria provided for in its National Constitution". While the tribunal acknowledged that Argentina was entitled to adopt such measures as it deemed "appropriate to emerge from the state of emergency", the measure's compatibility with Argentine's constitution had no relevance in the tribunal's analysis of whether Argentine had breached the applicable investment treaty. *See BG Group Plc.* v. *The Republic of Argentina*, UNCITRAL, Award, 24 December 2007, paras. 391–398, 407–412. For a general discussion on the role of domestic law in investment arbitration, *see* J. Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017).

30 Article 27 of the Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331.

assessed under CETA's investment protection rules and under the Constitution of Finland.

As noted, our analysis will focus above all on the parameters of indirect expropriation, because the reform proposals we analyse are unlikely to provide ground for compensation claims under CETA's FET and non-discrimination provisions. This is so for a number of reasons. Firstly, the ongoing reform process is transparent, with the meeting materials and agenda of the working group available online.[31] The membership of the working group also includes mining industry representatives whose input is taken into account during the process. Similarly, once the draft proposal is sent to the parliament, the proposal will be discussed in a number of parliamentary committees which will invite stakeholders to give their views on the proposal.[32] Since liability under CETA's FET provision requires that public bodies act in a way that constitutes, for example, "denial of justice" or "manifest arbitrariness", it is difficult to conceive of a situation where an investor could plausibly argue that Finland's legislative process – or the outcome of a legislative process – constitutes such grossly negligent or bad faith behaviour.[33] The legislative reforms will also apply equally to all mining companies regardless of the nationality of their owners, implying that it is not easy to think of a scenario where an investor could plausibly argue that the reforms constitute discrimination under CETA, even if the reforms have different *de facto* effects on investors.

We will now go through the three reform proposals one by one, and in each case first present the current legislative regime so as to analyse how the proposed changes would affect the position of mining companies.

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31 *See* at <https://tem.fi/kaivoslakityoryhman-kokousaineistot>, visited on 4 May 2021.

32 This basic procedure applies in relation to all legislative proposals. *See* Chapter 6 of the Constitution of Finland (731/1999).

33 The other grounds of breach of the fair and equitable treatment provision are "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief", and "abusive treatment of investors, such as coercion, duress and harassment". What further narrows the scope of CETA's FET standard is the exclusion of "legitimate expectations" as an independent ground of breach of fair and equitable treatment. Whereas investors can bring an independent legitimate expectations claim (tied to a FET provision) under most existing investment treaties, under CETA, when tribunals apply the FET provision, they "may [only] take into account whether a Party made a special representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated". *See* CETA Article 8.10.4.

## 3 An Analysis of Three Reform Proposals

### 3.1 *Restriction/Prohibition of Mining in and Close to Nature Conservation Areas*

#### 3.1.1 Under the Constitution of Finland

As in other Nordic countries, there is no constitutional court in Finland. Legislative proposals that may affect constitutional rights are vetted by the Constitutional Law Committee of the Parliament, whose membership consists of MPs, and which adopts statements after hearing stakeholders and constitutional law experts. The vetting process has been described as "abstract ex ante review of the constitutionality of legislation",[34] with the Committee's statement determining whether a proposal can be adopted by a simple majority or whether a qualified majority is required. In practice, if the Committee finds a proposal problematic in light of constitutional rights protection or of the protection guaranteed in human rights conventions to which Finland is a party, the proposal is typically amended so as to avoid the requirement of qualified majority vote.[35] The courts also play a role. Section 106 of the Constitution provides that when the application of a law "would be in *evident conflict* with the Constitution", courts have to give primacy to the Constitution without invalidating the conflicting law.[36] However, if the Committee has addressed the constitutionality of the relevant law in its statement, the courts are to follow the Committee's views.[37]

The Constitution was reformed in 1995 and its main purpose was to give legal recognition to the political-cultural changes that had taken place in the preceding decades.[38] For example, a new provision titled "Responsibility for the Environment" was included to give recognition to an increasing awareness of the importance of protecting the environment more effectively against the effects of urbanization, industrialism and growing use of natural resources.

34 J. Lavapuro, T. Ojanen and M. Scheinin, 'Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice', in J. Bell and M. Paris (eds.), *Rights-Based Constitutional Review. Constitutional Rights in a Changing Landscape* (Edward Elgar, 2016) p. 219.

35 On the ordinary voting procedure, *see* Section 72 of the Constitution. For the voting procedure concerning proposals on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation of the Constitution, see Section 73 of the Constitution.

36 Emphasis added.

37 *See* Government's proposal HE 1/1998, pp. 162–164.

38 For a general discussion on the historical background of the 1995 and subsequent constitutional reforms, *see* T. Ojanen, 'From Constitutional Periphery toward the Center – Transformation of Judicial Review in Finland', 27:2 *Nordisk Tidsskrift for Menneskerettigheter* (2009) pp. 194–207.

This provision, today Section 20 of the Constitution, provides that nature, its biodiversity and the environment are "the responsibility of everyone" and that "public authorities shall endeavor to guarantee for everyone the right to a healthy environment". Section 20 has gradually gained more weight vis-à-vis protection of property in the practice of the Constitutional Law Committee,[39] which exemplifies a broader evolution where the constitutional framework seeks to strike a more reasonable balance between protection of property and the public interest.

At the time of writing, 21 exploration permits are in force in and close to conservation areas, but no mines are currently operating in such areas.[40] Currently, ore exploration in conservation areas is possible if this does not compromise the purpose for which the area was founded.[41] If exploration is authorized and the bedrock contains rich deposits, granting a mining permit would require that the mining company makes an application to lift the protection order on the ground that it prevents "the implementation of a project or plan of overriding public interest".[42] This ground is available only in relation to private conservation areas, whereas conservation areas located in public land can only be used for mining if the conservation status is first lifted by adopting a relevant legislative act. Ore prospecting is also possible in areas included in the Natura 2000 network. An *exploration permit* requires that the mining authority determines that the planned exploration does not have a "significant adverse effect" on the ecological value of the Natura site. Since industrial mining tends to have such effect, a *mining permit* for a project located within Natura 2000 is only possible "for imperative reasons of overriding public interest, including those of a social or economic nature", and on the condition that the government adopts compensatory measures necessary to ensure the overall coherence of the Natura 2000 network. Conversely to the normal procedure, the government also decides whether the mining project should be authorized by applying the above "overriding public interest" test.[43]

39 *See* PeVL 69/2018 vp where Section 20 of the Constitution prevented (for the first time) the adoption of a legislative proposal in an ordinary voting procedure.

40 This figure is based on information provided to the authors by the Finnish Safety and Chemicals Agency (Tukes), which grants exploration and mining permits.

41 *See* Sections 13–17a of the Nature Conservation Act (1096/1996).

42 Section 27 of the Nature Conservation Act. The deciding authority is the Center for Economic Development, Transport and the Environment.

43 *See* Sections 64–69 of the Nature Conservation Act. It is noteworthy that the Natura rules apply with equal force to projects and plans located outside a Natura site when they are "liable to have a significantly harmful impact on the site" (Section 65). The rules related to Natura 2000 are based on the Birds and Habitats Directives, which only set minimum standards, implying that EU member states may set higher standards on environmental

Should mining be restricted or prohibited in and close to conservation areas (whether located on public or private land or in the Natura 2000 network), this could put a stop to a number of investments possessing an exploration permit located in such areas, *if* the restriction/prohibition applies to these exploration projects. For example, a British owned company has invested millions of euros to explore a deposit located beneath a Natura 2000 site in northern Finland, with the company currently preparing an environmental permit application.[44] How would the Constitutional Law Committee assess a legislative reform that would prevent this and similar type of mining projects from proceeding? On the one hand, the objective of such reform is clearly legitimate: protection of the ecological values of nature conservation areas so as to safeguard biodiversity. On the other hand, the reform would put an end to the concerned projects, with the investors unable to get any return on their investments.

In the practice of the Constitutional Law Committee, the general question of whether a legislative proposal is tantamount to expropriation or merely limits the use of property rights is answered by considering three interrelated factors.[45] First, all legislative proposals affecting constitutional rights – whether or not they are tantamount to expropriation – have to meet certain criteria, such as the requirement of sufficient precision and the requirements that the rights limitation has to have a legitimate purpose and must not go further than is necessary to achieve such purpose.[46] Second, to draw the line between indirect expropriations and rights limitations, the Committee assesses the following issues: how the proposal affects the value of the concerned property rights; is this effect temporary or permanent; can the property rights be used in some

protection. *See* Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, pp. 7–25; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, pp. 7–50.

44 The company has a website dedicated to the project, <finland.angloamerican.com/fi-FI>, visited on 4 May 2021.

45 The Committee has also referred to Protocol No.1 (Protection of property) to the European Human Rights Convention (ECHR) and to the case law of the European Court of Human Rights to note that the Protocol gives protection against indirect expropriations as well. *See e.g.*, PeVL 8/2017 vp.

46 Generally, rights limitations are possible for two distinct purposes: for the protection of another constitutional right and for the promotion of a legitimate public interest. The other requirements that all rights limitations have to meet are the following: the limitations have to be adopted in the form of a law (and not through lower-level regulations); the limitations must comply with Finland's obligations under international human rights treaties; and, finally, the requirement that the rights limitation must respect the essence of the right. For a concise discussion on these requirements, *see* T. Ojanen, *Perusoikeusjuridiikka* (University of Helsinki, 2015) pp. 42–47.

other economically beneficial way; what is the nature of the harm that the proposal seeks to address and how serious the harm is.[47] Finally, the third factor is relevant in relation to legislative proposals which seek to realize the objectives of Section 20 of the Constitution. The Committee has explicitly noted that today such proposals are more likely considered as constituting property rights limitations rather than indirect expropriations, given that Section 20 has increased the relative weight of environmental considerations vis-à-vis protection of property.[48] However, and naturally, whether the threshold of indirect expropriation is reached can only be answered on a case-by-case basis by assessing each proposal in detail.

At a more general level, the Committee has emphasized that addressees of legislative changes must have time to adapt to the changes and that legislation in general has to have an element of foreseeability.[49] The Committee refers often to reasonableness – and the idea is that unreasonable economic burdens may not be imposed on property owners, although the legislator has more discretion in relation to companies and other actors with sizeable assets than it has in relation to private individuals.[50] The Committee has also held that the legislator may not suddenly alter the basic principles governing contractual relationships, as this would shatter predictability and the legitimate

47 *See e.g.,* the Committee's statements PeVL 6/2010 vp, PeVL 8/2017 vp and PeVL 55/2018 vp. For a more general discussion, *see* P. Länsineva, 'Omaisuudensuoja', in P. Hallberg et al. (eds.), *Perusoikeudet* (Werner Söderström, 2011) p. 430. One interesting statement of the Constitutional Law Committee, which relied on some of these criteria, relates to the law that prohibits the use of coal for energy and heating purposes in Finland after 1 May 2029. The Committee saw that the prohibition was not tantamount to expropriation but constituted merely a limitation of the concerned property rights, with no compensation awarded to concerned energy companies. Two central factors influencing this conclusion were that the life cycle of the plants was in many cases coming to an end before 2029, and most of the plants were technically equipped to burn other substances in addition to coal. In other words, the permanence of the prohibition was counterbalanced by the fact that the companies could either utilize the plants by using other energy raw materials or that the plants were to close down regardless of the prohibition. *See* PeVL 55/2018 vp.

48 For example, when the Environmental Protection Act was amended to include an additional ground for denying environmental permits to peat production, the Committee saw that the inability of the landowner to use its property for peat production was not equivalent to expropriation given the high threshold of application set for the amendment (permits are granted on the condition that "peat production shall not lead to the deterioration of nationally or regionally significant natural values". The Committee emphasized that the amendment was clearly designed to promote Section 20 of the Constitution, which weighed in determining whether the proposal was proportionate to the legitimate aim pursued. *See* PeVL 10/2014 vp. *See also* PeVL 8/2017.

49 *See e.g.,* PeVL 21/2004 vp.

50 *See e.g.,* PeVL 10/2014 vp.

expectations of citizens. Private individuals have to be able to trust that the basic balance concerning their rights and responsibilities under contractual arrangements is not radically altered.[51] Hence, one might argue that similar considerations should also apply (analogously) in the vertical relationship between the legislator and private actors.

When the mining restriction/prohibition is assessed against these criteria and principles, it seems reasonable to argue that the prohibition would be tantamount to expropriation, *if* it applies to companies already exploring for ore. First, if we think of the criteria which the Committee uses to draw the line between rights limitations and indirect expropriations, the burden of the reform would fall squarely on the concerned mining companies' shoulders: it would be permanent; it would prevent the companies from exploiting the deposit; and the companies would not get any return on their investments as these would become worthless and untransferable. The sole reason for investing in exploration is the possibility to apply for the necessary permits if the deposit is rich so as to get a return on the initial investment. A legislative change that renders exploration investments worthless is clearly radical as it breaks the basic expectation that exploration companies have when making investment decisions. It would also go against the principles the Committee often invokes to test the constitutionality of legislative proposals, such as foreseeability and reasonableness.

Second, the Committee's criteria foreground a proportionality analysis in two ways: first, by requiring the carrying out of a "normal" proportionality test and, second, by requiring a closer analysis of the nature and seriousness of the harm that the legislative proposal seeks to address. While the purpose of the restriction/prohibition would be to counter biodiversity, in our view it is plausible to argue that its application to ongoing exploration projects goes further than is necessary to achieve such purpose for a number of reasons. First, a quite small percentage of exploration projects lead to mining permit applications, and these projects will have to comply with detailed permit conditions imposed on the operation of mines, such as limit values on the release of chemicals to adjacent aquatic systems.[52] The projects' realization also requires that either the protection status of the conservation area is lifted in a process that assesses the contrasting economic and ecological interests or that the government approves the project on conditions based on the Habitats and Bird Directives (the Natura 2000 requirements). In other words, the concerned mining projects already face a number of legal hurdles which were

51 *See e.g.,* PeVL 45/2002 vp and PeVL 25/2005 vp.

52 *See* Section 52 of the Environmental Protection Act.

raised to protect the environment. Second, the small number of exploration permits currently in force in conservation areas suggests that their geographical scope is small. Exempting these projects from the scope of the mining prohibition would not significantly undermine the objective of protecting biodiversity and, in any case, as noted, only a few them are likely to be economically feasible. The third general factor which supports our argument relates to Section 20 of the Constitution. It is commonsensical that its influence cannot categorically trump other rights enjoying constitutional protection – in other words, the influence of Section 20 has its limits. Hence, if mining is restricted or prohibited in and close to nature conservation areas, and if this prevents particular exploration projects from proceeding, this would be tantamount to expropriation of the concerned investments.[53]

This conclusion foregrounds the question of compensation. The starting point is the fair market value of the investment at the time of expropriation, and to our knowledge the Constitutional Law Committee has previously issued only a few statements that have some relevance in the present context. These statements related to the prohibition to build hydroelectric power plants on some of Finland's main rivers in the 1980s and 1990s. The Committee held that the prohibitions were tantamount to expropriation because hydroelectricity production was economically the most important form of use of the rights and because the prohibitions were permanent.[54] Some commentators and the Committee itself have implied that this prohibition could today be considered as falling short of indirect expropriation, owing in particular to Section 20.[55] Another factor supporting this view is that the prohibition did not prevent

53 As one commentator has argued, a legislative change which renders a property or an asset completely worthless and untransferable is tantamount to expropriation. *See* Ilkka Saraviita, *Perustuslaki* (Talentum, 2011) p. 234. The Constitutional Law Committee has confirmed that mining related rights constitute 'property' in the meaning of Article 15 of the Constitution, *see* PeVL 5/1963 vp. The ECtHR has also held that rights derived from permits and other decisions of public bodies constitute property in the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights. *See e.g.*, *Tre Traktörer AB v. Sweden*, no. 10873/84, § 53, 7.7.1989, para. 53.

54 *See* PeVL 18/1982 vp, 8/1986 vp, 4/1990 vp, PeVL 21/1993 vp. The compensation granted to the right holders was calculated on the basis of the nominal output of hydroelectric power that the plants could have produced, which equaled the fair market value of the water rights. Additionally, if a right holder had applied for a license to build a power plant, any incurred costs related to the application were also compensated. *See e.g.* Sections 2 and 3 of the Rapid Protection Act (23.1.1987/35). It is noteworthy that the rights holders were mostly profitable energy companies already operating a number of hydroelectric power plants, which implies that the prohibition negated only a small part of their planned investments in hydroelectricity.

55 *See* Länsineva, *supra* note 47; PeVL 55/2018.

the energy companies from using the water rights in other ways, even if the production of hydroelectricity was the most important form of use.[56] Be that as it may, the mining prohibition is clearly different from the hydroelectricity example. First, rights pertaining to mining projects cannot be utilized in other ways if the legislator prevents the projects from proceeding on a permanent basis. This would support the view that fair market value is the relevant standard in the present context. Generally, and to simplify a complex matter, the fair market value of a mining project depends on the richness of the deposit. The more ascertained information there is on the deposit, the easier it is to assess the price at which the mining rights could have been sold before the impending mining restriction/prohibition became known.

Yet at the exploration stage it is not possible to know whether a company is able to obtain the required permits, and neither is it possible to know whether the project will be economically feasible, given that fluctuations in market prices may incline a company not to proceed with a project even if the deposit is rich. What also speaks against the application of fair market value is that the legislative reform would effectively destroy the market in relation to the concerned investments: rights over the deposit are untransferable and cannot be utilized by anyone.

In our view, these factors support the argument that if the exploration is at an early stage and the contents of the deposits have not been ascertained, the mining companies should either receive no compensation or only partial compensation for their sunk costs on the condition that the richness of the deposits can somehow be ascertained. In contrast, if the richness of the deposit is known/ascertained and if the company is preparing permit applications when the prohibition is adopted, using fair market value would be a more reasonable approach to calculate the amount of compensation.[57] However, the growing recognition of the importance of protecting biodiversity and the environment more generally, which Section 20 and its subsequent interpretation now embody, could also justify paying less compensation than fair market value.[58]

56 *See* PeVL 8/1986.

57 Determining an investment's value with reference to past costs is called a "backward-looking method", whereas "forward-looking methods" seek to determine an investment's value in light of its "profit-making potential". *See* N. Rubins, V. Sinha and B. Roberts, 'Approaches to Valuation in Investment Treaty Arbitration', in C. Beharry (ed.), *Contemporary and Emerging Issues in International Investment Law* (Brill Nijhoff, 2017) p. 185. For a comprehensive discussion on compensation standards and valuation methods in investment arbitration, *see* M. Kantor, *Valuation in Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer, 2008).

58 There are several other factors as well that could be taken into account when the amount of compensation is considered. For example, it is not possible to know whether the company

### 3.1.2 In Light of CETA's Indirect Expropriation Provision

Expropriation provisions in investment agreements determine what constitutes an expropriatory action and list the conditions under which they are lawful. Traditionally, these include the requirements of public purpose, non-discrimination, due process and the payment of compensation.[59] As cases of direct expropriation have become less common, the question of what constitutes an indirect expropriation has become "one of the most important issues in international investment law",[60] with investors having alleged indirect expropriation in 45 per cent of publicly known cases.[61] Generally, indirect expropriation refers to measures which have similar effects as a direct expropriation without involving a transfer or termination of an investor's title to property.[62] The difficulty lies in drawing the line between indirect expropriations and non-compensable regulatory measures which merely decrease the value of property rights. The increasing prevalence of indirect expropriation claims and the inconsistent approaches[63] that tribunals have adopted in relation to such claims have raised concerns about the effect this has on the policy autonomy of host states. In particular, the concern is that (some) arbitral tribunals have expanded the notion of indirect expropriation to the extent that public policy measures traditionally considered as non-compensable may now lead to liability for damages.[64]

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would have ultimately received the necessary permits or how much the conditions imposed in the permits would have affected the profitability of the mine. The credibility of the company's business plan, the company's experience in operating similar type of mining projects, and market variables such as demand predictions and existing competition are other relevant considerations.

59 UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (UN Publishing, 2004) p. 239.

60 S. Nikièma, 'Best Practices: Indirect Expropriation', *IISD Best Practice Series*, March 2012. Some make a distinction between indirect expropriation, *de facto* expropriation, creeping expropriation and measures tantamount to expropriation. For a discussion on these distinctions, *see* U. Kriebaum, 'Expropriation', in M. Bungenberg *et al.* (eds), *International Investment Law* (Nomos, 2015) p. 971.

61 J. Bonnitcha, L. Skovgaard Poulsen, and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) p. 105.

62 B. Stern, 'In Search of the Frontier of Indirect Expropriation', in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (Nijhoff Publishing, 2018) p. 35.

63 *See*, for example, J. Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014) p. 242.

64 This led, already in 2012, the United Nations Commission on Trade and Development (UNCTAD) to call for more precisely drafted expropriation clauses which would "clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect

To address this concern, CETA treaty drafters formulated the expropriation clause by taking into account innovations in recent treaty-making practice and by including elements from existing case law. The main expropriation provision is Article 8.12, which provides that the parties shall not expropriate investments directly or indirectly except for a public purpose, under due process of law, in a non-discriminatory manner, and on payment of prompt, adequate and effective compensation.[65] Annex 8-A of CETA provides a definition of indirect expropriation. The relevant part of Annex 8-A reads as follows:

> indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it *substantially deprives* the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. (EMPHASIS ADDED)

When considering whether such "substantial deprivation" has taken place, CETA tribunals have to consider, among other things:

(a) *the economic impact* of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
(b) *the duration* of the measure or series of measures of a Party;
(c) the extent to which the measure or series of measures *interferes with distinct, reasonable investment-backed expectations*; and
(d) *the character* of the measure or series of measures, notably their object, context and intent. (emphasis added)

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expropriation and legitimate regulation that does not require compensation". This was necessary because "some arbitral tribunals have tended to interpret … broadly" what constitutes an indirect expropriation, and such interpretations have "the potential to pose undue constraints on a State's regulatory capacity". *See* UNCTAD, *Investment policy framework for sustainable development* (UN Publishing, 2012) p. 83.

65 That mining related property rights constitute a protected investment under CETA is clear: Article 8.1 provides that "investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" and, further, that an investment may take the form of "a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources".

However, paragraph three of the provision contains the so-called police powers doctrine by providing that:

> 3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, *non-discriminatory measures* of a Party that are designed and applied *to protect legitimate public welfare objectives*, such as health, safety and the environment, *do not constitute indirect expropriations*. (EMPHASIS ADDED)

Taken together, CETA's indirect expropriation provisions are poles apart from their traditional equivalents, which contain no definition of what constitutes an indirect expropriation, nor refer to the police powers doctrine.[66] As noted, many of these expressions stem from or are variations of existing case law or derived from the provisions of Canada's Model BIT. The general criterion of "substantial deprivation" and its synonyms ("radical", "fundamental" or "serious deprivation") are used systematically by tribunals to assess indirect expropriation claims.[67] For example, in *Pope & Talbot*, when concluding that the challenged measure was not tantamount to expropriation, the tribunal reasoned that for a finding of expropriation, a "substantial deprivation" of an investment has to take place, and such deprivation would indicate that the owner is not able to "use, enjoy, or dispose of" it in a normal way.[68] The criterion of "economic impact" resembles the sole effects doctrine, under which the adverse effect of a measure is the sole criterion determining whether an indirect expropriation has taken place.[69] This doctrine gives no recognition to

66 This has not prevented tribunals from invoking the doctrine. For example, in *Chemtura* v. *Canada*, the tribunal reasoned that a non-discriminatory measure adopted to protect human health and the environment constitutes a "valid exercise of the State's police power and, as a result, does not constitute an expropriation". *See Chemtura* v. *Government of Canada*, UNCITRAL, Award, 2 August 2010, para. 254. The arbitration was based on NAFTA's investment protection rules, which do not refer to the police powers doctrine.

67 For an overview of the relevant case law, see J. Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019) pp. 101–113.

68 *Pope & Talbot Inc.* v. *The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, para. 102. The tribunal derived the phrase "use, enjoy, or dispose of" from Article 10(3) of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. The Convention is reprinted in *Yearbook of the International Law Commission* (1969, Vol. II) pp. 142–149.

69 The sole effects doctrine was applied in *e.g.*, *Saar Papier* v. *Poland*, UNCITRAL, Award, 16 October 1995; *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000; *Pope and Talbot* v. *Canada*, Interim Award, 28 June 2000. As Ortino observes, while in none of these cases did the tribunals explicitly refer to the sole effects doctrine, "it is difficult to dispute that such doctrine accurately describes the approach

the purpose or objective of the measure, but this approach is losing traction as investment tribunals have increasingly incorporated a measure's purpose into their analyses of indirect expropriation claims.[70]

The duration of the contested measure has also been considered by investment tribunals,[71] but the expression of whether the measure "interferes with distinct, reasonable investment-backed expectations" is less familiar, mostly due to its late inclusion in investment treaties. It was first included in the US Model BIT in the early 2000s and is also found in Canada's 2014 model BIT.[72] Originally, the expression was used by the United States Supreme Court in the *Penn Central* case.[73] There, the question was whether the rejection of an application to build new office space above the Penn Central train station in Manhattan constituted an indirect expropriation. The train company wanted to utilize the airspace rights it had above the train station so as to construct office buildings, but New York's Landmark Preservation Commission held that the building project was incompatible with a city-wide historical preservation plan. In its decision, the Supreme Court held that the Commission's decision did not constitute a regulatory taking, and one of the reasons was that the company's "investment-backed expectations" were met because it could "continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions", indicating that the rejection of the building project did not "interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel".[74]

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undertaken by … [the] tribunals". *See* F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press, 2019) p. 65.

70 *See e.g.*, *CME* v. *the Czech Republic*, Partial Award and Separate Opinion of 13 September 2001, para. 603; *SD Myers* v. *Canada*, Partial Award, 13 November 2000, paras. 280–281, 285; *Tecmed* v. *Mexico*, ICSID Case No ARB (AF)/ 00/ 2, Award, 29 May 2003, paras. 118–119.

71 *See e.g., Middle East Cement Shipping* v. *Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 107; *Azurix Corp.* v. *Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 313; *Biwater Gauff* v. *Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 463. Some tribunals have held that measures constitute an expropriation only when they are "irreversible and permanent" and "not ephemeral or temporary" but, as Cox notes, it is commonsensical that even temporary measures may cause permanent deprivation of an investment and she adds that most tribunals "have … recognized that temporary measures are capable of amounting to an expropriation". *See* Cox, *supra* note 67, p. 113. The quotes are from *Tecmed* case, *supra* note 70, para. 116 ("irreversible and permanent"); *Fireman's Fund Insurance* v. *The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, para. 176 ("not ephemeral or temporary").

72 The story of how the Penn Central test found its way into the US Model BIT is told in A. Sanders, 'Of All Things Made in America Why Are We Exporting the *Penn Central* Test', 30:2 *Northwestern Journal of International Law & Business* (2010) pp. 339–381.

73 *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

74 *Ibid.*, para. 136

Whether or not this type of reasoning is used by CETA tribunals, the approach is sensible and implies that what is relevant is the way in which the measure affects the primary or basic expectation of the investor regarding how it can use the relevant property rights once the investment is made.

Another element deserving some comments is the "character" of the measure which is explained to refer to its "object, context and intent". Kriebaum has criticized the inclusion of the term "intent" on the ground that in her view it places a "burden of proof on the investor … to demonstrate the motivations behind government action".[75] In other words, she understands the term to refer to a requirement that the claimant investor has to establish an intent to expropriate on the part of the host state. However, a different, and in our view more common-sense approach to "intent" in this context is that it is merely a substitute for the word "purpose". In other words, "intent" should be understood as referring not to an expropriatory intent, but to the purpose with which the host state seeks to justify the measure.[76] The point is not that such intent or purpose should be taken at face value – rather, any claimed intent or purpose should be subjected to critical analysis. As to the words "object" and context", they too can be understood in many ways, but in our view "context" refers to the broader factual circumstances to which a particular measure relates to and stems from, whereas "object" is either simply another synonym for purpose/intent or then refers to the property which the contested measure targets.

As the elements included in the indirect expropriation provision are indicative, CETA tribunals may consider other factors as well in their analyses. At the same time, however, it is difficult to think of other generally relevant factors, even if such may arise in case specific circumstances. Moreover, the mining restriction/prohibition scenario is so clear-cut in terms of its purpose and effect that it is relatively straightforward to assess whether it would be compatible with CETA. Leaving aside the police powers provision for the moment, the primary (or only) expectation of a mining company is that it can utilize the explored deposits so as to get a return on its investment. The prohibition eliminates this expectation as the concerned companies cannot use their rights over the deposits in any way. Equally evident is that the restriction/prohibition would substantially deprive (or destroy) the economic value of the investment, and it is also permanent. However laudable the objective of environmental protection is, the effect of the mining restriction/prohibition would

75 *See* Kriebaum, *supra* note 6, p. 465.

76 Henckels appears to agree with this position. See Henckels, *supra* note 6, p. 41. *See also* Cox, *supra* note 67, pp. 125–127 (discussing case law which addresses the concept of intent in the context of expropriation claims).

be so categorical that it can only lead to the conclusion that such legislative change would constitute an indirect expropriation, compelling the payment of compensation. The question of compensation is addressed below, but before that it is necessary to discuss whether the application of CETA's police powers provision could lead to a different conclusion.

The interpretation of the provision raises some intricate questions. On the one hand, the text suggests that even if a measure constitutes an indirect expropriation, the investor will not be compensated if the measure is non-discriminatory and has a legitimate public welfare objective, apart from "rare circumstances" where the measure's impact "is so severe in light of its purpose that it appears manifestly excessive". In other words, some measures which meet the threshold of indirect expropriation are nonetheless non-compensable under the provision. This may sound somewhat paradoxical, but it is clearly the only plausible interpretation as the police powers provision would have no independent value if a finding of indirect expropriation would always lead to the payment of compensation. But how should the line between compensable and non-compensable measures be drawn under the provision?

As a first matter, the provision clearly foregrounds a proportionality analysis between the objective of a measure and its impact. On the whole, and typically, laws and regulations promoting "public welfare objectives" seek to improve a particular state of affairs by addressing a concern. For example, the mining restriction/prohibition would seek to counter biodiversity loss and thereby promote the public welfare objective of environmental protection. But this general observation hardly helps in specifying the general parameters of CETA's police powers provision. Another factor that might help is the role of the concerned investors in the adoption of the relevant measure. For example, if an investor acts in bad faith or negligently and thereby causes harm, and if this behaviour triggers a regulatory response tantamount to expropriation, the application of the police powers doctrine is much more plausible than in situations where such measure targets an investor acting in full compliance with domestic laws and regulations. There are many variants between these two extremes of course, but this approach provides a useful starting point for our analysis. We will now discuss the different elements of the provision.[77]

77 It is noteworthy that Article 28.3 of CETA incorporates the general exceptions clause found in Article XX of the GATT 1994 into CETA. This clause is well-known among trade lawyers and allows states to adopt measures to protect (e.g.) human, animal and plant life or health on the condition that such measures are applied in a manner that do not constitute a means of arbitrary or unjustifiable discrimination. Article 28.3 specifies that the relevant measures include environmental measures necessary to protect human, animal or plant life or health

A legislative change that would prevent exploration projects from proceeding in nature conservation areas is clearly non-discriminatory – it applies to all investors regardless of their nationality – and it is undoubtedly undergirded by a legitimate public welfare objective. But would such legislative change be "manifestly excessive" in light of this objective? Generally, manifestly excessive is a cousin of arbitrariness and bad faith in that the use of these words requires that a measure immediately strikes as unreasonable to an external viewer.[78] Of course, setting the restriction/prohibition in proportion to the objective is not a straightforward task. What is proportional for one is often manifestly excessive to another, and adopting a particular perspective depends significantly on where one's political sympathies lie and on what view one has of state-market relations more generally.

One factor that provides a useful tool in assessing the question of proportionality more objectively is to look at how the restriction/prohibition would fit into the decades-old governance philosophy of mining in Finland. That philosophy is based on the idea that it is relatively easy to engage in exploration, but this "easy access" is counterbalanced by a thorough permitting process, which seeks to guarantee that the mine's operation complies with various safety and environmental requirements imposed under national and EU law. Evidently, a legislative change that prevents the concerned investors from exploiting the deposits would go against this governance philosophy by abolishing the equilibrium of rights and responsibilities applying to mining companies. The only reason for investing in ore exploration is the assumption that the company

as well as measures for the conservation of non-living exhaustible natural resources. The exception applies only in relation to sections B (establishment of investments) and C (non-discriminatory treatment) of the investment chapter, and thereby excludes from its scope section D which includes the fair and equitable treatment and indirect expropriation provisions. However, Article 8.18 also creates the general limitation that investors cannot bring any claims related to establishment of investments (i.e. claims related to section B of the investment chapter). Taken together, these rules mean that a state can only invoke Article 28.3 to defend itself against a claim based on alleged non-discrimination at the post-establishment stage (by arguing that the different treatment is justified under the GATT exception).

78 It is interesting to note that in the three pending arbitrations between Canadian investors and Colombia, which concern the prohibition of mining in high-altitude ecosystems, the applicable investment treaty contains the following police powers provision: "Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that *it cannot be reasonably viewed as having been adopted in good faith*, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation" (emphasis added). See Annex 811, Article 2(b) of the Free Trade Agreement between Canada and Colombia.

will have priority rights over the deposit, which allows it to seek the relevant permits if the deposit is rich enough.

Above we referred to how the role of investors in bringing about a measure should also be taken into account when assessing CETA's police powers provision. A mining restriction/prohibition would not be adopted in reaction to specific, irresponsible mining practices, but as part of a broader strategy of improving environmental protection. In other words, the legislative change would not in any way relate to the behaviour of the concerned investors. However, to what extent would the new law actually protect biodiversity? There are less than two dozen exploration permits located in and close to conservation areas and (given the statistical record) it is highly likely that only a very small number of these exploration projects will lead to mining permit applications. In addition, the projects that do proceed will have to comply with detailed permit conditions imposed on the mine's operation, and their realization would also require that either the protection status of the conservation area is lifted (in a process that assesses the contrasting economic and ecological interests) or that the government approves the project on conditions based on the Habitats and Bird Directives (the Natura 2000 requirements). In this light, and on balance, exempting the 21 existing exploration projects from the scope of the restriction/prohibition would not have a significant impact on the realization of the reform objective.

On the whole, and taking into account the above considerations, the proposed mining restriction/prohibition would appear to be excessive if it were to apply to existing investments, but would the reform be manifestly excessive and require the payment of compensation? In Finland, the Constitutional Law Committee has not used this type of criterion to assess legislative proposals, although proportionality is a central element in its analyses. This would suggest that CETA's police powers provision sets a higher threshold for compensation than the Finnish Constitution. On the other hand, while CETA's right to regulate clause and the references to the purpose of legislation in the indirect expropriation provisions seek to ensure a more reasonable balance between the public interest and the rights of investors, these provisions cannot create an unrestricted policy space to host states. As the restriction/prohibition would wipe out the basic rights of the concerned investors, render their investments worthless and untransferable and break the basic expectation of investors in relation to the use of the investments, it is not implausible to argue that the reform is manifestly excessive, particularly if the investors receive no compensation under domestic law.[79]

79 The legislator may grant such compensation even when the Constitutional Law Committee considers that a legislative proposal is not tantamount to expropriation. The Committee has

If this were the case, the question of compensation would come under consideration. Article 8.39.3 of CETA provides that monetary damages "shall not be greater than the loss suffered by the investor", and in case of (indirect) expropriations the compensation "shall amount to the fair market value of the investment". In a number of cases, investment tribunals have awarded compensation to mining companies based on their future profits even if the investments have had no established performance record. This is not surprising given the basic meaning of "fair market value" and its common use in investment treaties.[80] In practical terms, fair market value is the price a buyer would be willing to pay to a seller to purchase the investment in the absence of coercion, where the parties are at arm's length, have realistic knowledge of the relevant facts, and operate in an open market.[81] One recent example of an early stage investment receiving sky-high compensation is provided by the *Tethyan* v. *Pakistan* arbitration where the company had invested USD 150 million to a mining project which never received the necessary licenses to construct and operate the mine. Finding that the denial of licenses was tantamount to expropriation, the tribunal awarded the claimant around USD four billion (plus interest) in compensation by using a modern version of the so-called discounted cash flow method to valuate Tethyan's lost profits.[82] While the case did not stem from a legislative change but from decisions of other branches of government, the same method could be used to calculate compensation for damages flowing from a legislative change that puts a stop to exploration stage mining projects.

Since exploration projects take time, the accuracy of predicting future revenue from discovered deposits to be extracted by using conventional mining techniques will vary depending on how much information exists on the explored deposits. Hence, the amount of compensation under CETA should also vary accordingly, and our remarks in the previous section are equally valid

consistently held that a constitutional rights limitation does not automatically compel the payment of compensation to concerned property owners and neither does the Constitution require the payment of full compensation in such situations. Rather, compensation is just one factor that comes into play when the Committee considers whether a rights limitation is constitutional. *See e.g.* PeVL 55/2018 vp.

80 For a discussion, *see* I. Marboe, 'Assessing Compensation and Damages in Expropriation versus Non-expropriation Cases', in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Brill, 2018) pp. 122–127.

81 *See* M. Kinnear, 'Damages in Investment Treaty Arbitration', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) p. 557.

82 *Tethyan Copper Company Pty Limited* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019. Pakistan has filed an application to annul the award.

here. But as *Tethyan* v. *Pakistan* demonstrates, even if a mining project has no established performance record, this does not mean that compensation will be limited to an investor's sunk costs. When reliable information exists to predict future revenue, tribunals may well adopt the approach of the *Tethyan* tribunal. However, what differentiates *Tethyan* and similar cases from the mining restriction/prohibition scenario in Finland is that in the latter scenario there is no open market in which the investment could be sold as the deposit would remain intact. In other words, the concerned investors could not sell their rights over the deposit in an open market because of the legislative change. This should be taken into account in the tribunal's valuation. It is noteworthy that the mining project in *Tethyan* has not been abandoned, as the Pakistani government is contemplating whether to continue the project through a state-owned company or in collaboration with a private actor (the government is also negotiating with *Tethyan*).[83]

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The above discussion demonstrates that similar types of criteria are used under CETA's indirect expropriation provisions and in the constitutional review of legislative proposals in Finland to determine whether a measure is tantamount to expropriation. The economic impact of the legislative change, its duration and purpose, the question of whether the change is proportionate to the public interest pursued, and the nature and seriousness of the harm that the change seeks to address are part and parcel of the analysis under both legal systems. Section 20 of the Constitution and the phrase "manifestly excessive" in CETA are central when the line between compensable and non-compensable legislative changes is drawn. At first sight, the two appear to have different connotations but their general influence is quite similar: both increase the tolerance required of investors vis-à-vis environmental measures affecting the value of investments. In one way, the practice of the Constitutional Law Committee approaches CETA's police power provision as it has gradually changed the basic dynamics of proportionality analysis under the Constitution to a direction where substantial limitations on property rights (the purpose of which is the realization of objectives of Section 20) are considered non-compensable.

Yet, the restriction/prohibition scenario demonstrates that environmental considerations cannot act as trump cards. Legislative changes that wipe out

83 *See* A. Shahzad, 'Pakistan in talks with Tethyan Copper to resolve $5.8 bln dispute -sources', *Reuters*, 12 November 2020, <uk.reuters.com/article/pakistan-mining-tethyan-idUKL1N2HY21U>, visited on 28 April 2021.

the value of an investment and make it untransferable are highly likely to be assessed as incompatible with the Constitution and CETA's indirect expropriation provision, particularly when the investor has made the investment in good faith, in compliance with domestic laws and regulations, and with the basic expectation that the property rights can be utilized in accordance with those laws and regulations (as they stood at the time the investment was made). The proposal to restrict/prohibit mining in nature conservation areas would signal a wholesale makeover of the current legislative framework, and in our view if the proposal is adopted, existing mining projects should either be exempted from the application of the new law on grounds discussed above or, alternatively, the concerned companies should be compensated given that the proposal would render their investments worthless and untransferable – although, as we noted, compensation is not necessary in all scenarios, and the difficulty lies in finding appropriate levels of compensation in situations where the richness of the deposits is still uncertain.

This basic argument does not imply that the two legal systems will invariably produce similar outcomes regardless of the type of legislative change. The criteria of and textual formulations pertaining to indirect expropriations are still different (to a degree) under the Constitution and under CETA. Further, and despite the many reforms, the *raison d'être* of CETA's investment chapter is investment protection, whereas the constitutional framework in Finland is premised on protecting and promoting a variety of private rights and public goods, with no single interest occupying a similarly central role. This suggests that in some cases CETA tribunals and the Constitutional Law Committee may come to different conclusions regarding the question of whether a legislative change meets the threshold of indirect expropriation.

### 3.2 *Mining Tax and Collateral Payments*

#### 3.2.1 Mining Tax

After reviewing decisions of investment tribunals dealing with taxation measures, one commentator concluded that

> tribunals have emphasized that it will only be an extreme case in which a taxation, general in nature, will be considered expropriatory and have placed particular emphasis on whether the measure is discriminatory and/or in breach of a specific commitment to the investor (e.g. in a stabilization clause), as well as the State's intent.[84]

84 Cox, *supra* note 67, p. 197.

In other words, although taxation invariably reduces the profitability of investments, "non-discriminatory, bona fide general taxation" cannot amount to a breach of an investment treaty in the absence of a stabilization clause.[85] This basic approach is found in the few investment disputes which have related specifically to the taxation of the mining sector. In *Paushok* v. *Mongolia*, the claimant company argued that the adoption of a windfall profits tax on the sale of gold violated its legitimate expectations and constituted an expropriation or was tantamount to expropriation of its investment. The tribunal reasoned that while the tax imposed a considerable burden on the profitability of the investment, changes in tax policy are a regular feature of politics and investors could not have any legally protected expectations that such policies remain unchanged (unless the investor had concluded a stabilization agreement with the host state).[86] Neither did the challenged tax amount to an expropriation as the mine had continued to operate after the introduction of the tax.[87] In the *Revere Copper* arbitration, which concerned an investment in a bauxite mining project, the claimant investor had concluded an investment agreement containing an express stabilization clause regarding taxation measures. Unsurprisingly, the tribunal held that a series of measures (including taxation measures) adopted by the Jamaican government constituted a repudiation of the investment agreement between the claimant and Jamaica, for which the latter was liable to pay compensation.[88]

In Finland, the Constitutional Law Committee has held that only a confiscatory tax, which implies a transfer of private property to public ownership (e.g. by forcing taxpayers to sell the taxed property so as to pay the tax) is problematic in light of the Constitution.[89] A number of investment tribunals have reasoned similarly. For example, in *Burlington* v. *Ecuador*, the tribunal noted that two limitations on the state's power to tax flow from customary international law: taxes must be non-discriminatory, and they may not be confiscatory. As to the latter, the tax rate and the amount of payment required were essential considerations for the tribunal, and if "the amount required is so high that taxpayers are forced to abandon the property or sell it at a distress price, the

85 The quote is from *Marvin Feldman* v. *United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 106.

86 *Sergei Paushok* v. *The Government of Mongolia*, UNCITRAL, Award, 28 April 2011, para. 305.

87 *Ibid.*, paras. 330–337.

88 *Revere Copper* v. *Overseas Private Investment Corporation*, AAA, Award, 24 August 1978, 17 ILM 1321 (1978).

89 PeVL 2/1976 vp; PeVL 12/1986 vp.

tax is confiscatory".[90] While the rate and details of the planned mining tax in Finland are unknown, it is commonsensical that the tax will not be confiscatory or discriminatory in nature. Globally, a mining tax or royalty is the industry standard, and some mining companies operating in Finland have explicitly acknowledged that the adoption of such tax is only a question of time.[91] It seems unnecessary to discuss the matter further because it seems evident that the planned mining tax will not give ground for compensation claims under the constitution or under CETA.

### 3.2.2 Collateral Payments

Currently, mining companies are obligated to deposit collateral for two distinct purposes. First, under the Mining Act, the purpose of the collateral is to guarantee that mining companies carry out termination and after-care measures so as to restore and recontour mining sites once the mining seizes.[92] Second, under the Environmental Protection Act, the purpose of the collateral is to "ensure appropriate waste management" both during and after the cessation of operations,[93] and the collateral also has to "cover the costs of restoring to a satisfactory state" the land area within which the waste is located (plus any land area affected by the waste).[94] The perception that current collateral levels are inadequate stems not only from environmental problems caused by mines closed a long time ago but also from the serious environmental problems caused by the Talvivaara mine in the early 2010s, which significantly weakened the public image of mining in Finland.[95]

To our knowledge, there is only one case where an investment tribunal has addressed these types of collateral payments or analogous obligations. In

90 *Burlington Resources* v. *Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 393.

91 When a Citizens' initiative on the reform of the Mining Act was discussed at the Finnish parliament, one industry representative noted that a mining tax is essential for the social acceptability of mining in Finland, and that royalty payments or mining taxes are already the industry standard. *See* statement by Thomas Hoyer, CEO of Latitude 66 Cobalt Oy, 28 November 2019 <https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2019-AK-276958.pdf>, visited on 27 April 2021.

92 The collateral has to be "sufficient in view of the nature and extent of mining activity, the permit regulations issued for the activity, and collateral demanded by virtue of other legislation". See Section 108 of the Mining Act.

93 Section 59 of the Environmental Protection Act.

94 Section 60 of the Environmental Protection Act.

95 *See e.g.*, *Yle News*, 'Claimants walk away from compensation suits against broke Talvivaara mining firm', 17 September 2016, <https://yle.fi/uutiset/osasto/news/claimants_walk_away_from_compensation_suits_against_broke_talvivaara_mining_firm/9175162>, visited on 27 April 2021.

*Glamis Gold*, a Canadian investor (planning the construction of a gold mine) claimed that the introduction of mandatory backfilling requirements by the State of California was, *inter alia*, tantamount to expropriation under the North American Free Trade Agreement (NAFTA). According to the claimant, the state authorities had also given specific assurances that it would not adopt such a regulation. The tribunal held that while the backfilling requirements clearly surprised the claimant and upset its expectations, it had not received any specific assurances that such regulation would not be adopted, and neither did the requirements render its investment worthless: hence, no indirect expropriation had taken place.[96]

Generally, the current provisions on collateral are open-ended and contain very flexible criteria. This suggests that the provisions enable the authorities to increase collateral levels in comparison to current practice, even if the provisions are not amended. Should the provisions be amended, it seems evident that also the reformed criteria have to be relatively general, given that mining projects are very different in terms of their environmental impact. A legislative proposal tweaking the collateral provisions so as to ensure their adequacy would probably not raise constitutional concerns in the analysis of the Constitutional Law Committee. The Committee might be content with noting that individual payments must not be unreasonable or disproportionate and that mining companies will have to be able to challenge the amounts of collateral before administrative courts (which they of course can already do under existing law).

Under CETA, in principle, if collateral payments render a mining project unprofitable, an investor could argue that they constitute an indirect expropriation of its investment or, alternatively, that they are manifestly arbitrary in the meaning of the fair and equitable treatment provision. Nevertheless, such arguments are more likely to fail than succeed. As a first matter, the sole purpose of the payments is to ensure that mining companies meet their environmental obligations. As noted, the proposal that collateral levels should be raised stem from public frustration caused by incidents where mines have caused environmental degradation, with mining companies either refusing or unable to do the necessary clean-up work and/or compensate the damages caused. The level of collateral will be based on predictions regarding the impact of the mine's operations, and while there will be disagreement in individual cases, it is difficult to see how decisions on collateral could be considered, for example, as "manifestly excessive" in light of their purpose. If additional collateral payments are imposed on ongoing mining projects, and if this makes some of

96 *Glamis Gold, Ltd.* v. *The United States of America*, UNCITRAL, Award, 8 June 2009.

the concerned investments unprofitable, the indirect expropriation argument has an element of plausibility to it. Still, given that the payments will only seek to ensure compliance with basic environmental obligations, compensation claims under CETA are unlikely to succeed.

## 4 Conclusions

In November 2019, Aura Resources Ltd., an Australian mining company, sent a letter to the Swedish government, claiming that Sweden had breached its obligations under the Energy Charter Treaty (ECT).[97] The company had made investments through a Swedish subsidiary in a number of large uranium mining projects, which the company was forced to abandon and write-off as a result of a legislative change which banned all mining of uranium in Sweden with effect from August 2018. The company was developing the projects (and had valid exploration permits) when the ban entered into force and one of its principal claims was that the new legislation amounted to an indirect expropriation of its investments, as the new law rendered the mining projects worthless and untransferable.[98] The company ended the letter by noting that the damages it suffered totalled at some USD 1.8 billion and invited the government to engage

97 The letter is available online, <https://www.italaw.com/sites/default/files/case-documents/italaw11121.pdf>, visited on 4 May 2021.

98 When the law was adopted, no mining company had obtained a uranium extraction permit, whereas four companies had obtained a uranium exploration permit. The government's proposal concerning the new law addressed the question of compensation for companies having such exploration permits. The proposal noted that an exploration permit does not in itself authorize exploration. What is also needed to carry out uranium exploration is a valid "work plan" ("*arbetsplan*" in Swedish). The proposal also noted that an exploration permit does not ensure that the company receives the other necessary permits at a later stage if the uranium deposits turn out to be rich enough. The conclusion was that the companies were not entitled to compensation under the Swedish Constitution's section on the protection of property. The proposal did not address the question of whether the four companies had prepared the required work plans, and neither did it shed light on whether the four companies could or were planning to explore other minerals in the areas where the uranium exploration permits were located (some online articles suggest that Aura Resources has continued at least some of the projects because the deposits contain other minerals as well). Overall, the proposal does not enable a detailed analysis of the grounds upon which the denial of compensation was based or of the potential differences in the constitutional standards of review applicable in Finland and Sweden. *See* Regeringens proposition 2017/18:212 (Förbud mot utvinning av uran), <www.riksdagen.se/sv/dokument-lagar/dokument/proposition/forbud-mot-utvinning-av-uran_H503212/html>, visited on 12 November 2020. *See also*, World Nuclear News, 'Aura

in negotiations over the claim. In its reply, the Swedish government rejected the company's claims in their entirety. The government noted that the legislative change is fully compatible with Sweden's obligations under "all applicable laws" and that in any case the company "does not have the requisite jurisdiction to pursue its claims".[99] This argument probably referred to the fact that Australia has not ratified the ECT, nor accepted its provisional application, and it is somewhat strange why the company and its lawyers decided to base their claim on the ECT in the first place.[100]

Generally, the Nordic countries have a trouble-free track record in terms of investment arbitration. While 2020 witnessed the first ever claims against Denmark and Norway (one claim each),[101] Finland and Sweden[102] have not been hit by a single compensation claim under BITs and Iceland has never concluded investment treaties. This statistic might reinforce the perception that politically stable Western (social-)democracies are insulated from hefty compensation claims under investment treaties, but other factors are also at play. Around 30 per cent of all known investor claims have been brought against developed economies,[103] and one central reason explaining the very low number of claims against the Nordic countries is that they are primarily exporters of capital under their existing BITs. In other words, most of their BITs have been concluded with states whose investors have not made any large-scale investments in the Nordic countries.[104] CETA is clearly a game changer in the sense that Canadian investors have existing investments in the

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seeks compensation for Swedish uranium ban', 11 November 2019, <world-nuclear-news.org/Articles/Aura-seeks-compensation-for-Swedish-uranium-ban>, visited on 3 May 2021.

99 The reply letter is available at <https://www.italaw.com/sites/default/files/case-documents/italaw11476.pdf>, visited on 3 May 2021.

100 Australia has only signed the ECT and it explicitly rejected its provisional application when signing the treaty, <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/australia/>, visited on 3 May 2021.

101 *Donatas Aleksandravicius* v. *Kingdom of Denmark*, ICSID Case No. ARB/20/30; *Peteris Pildegovis and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11.

102 However, in December 2020, Huawei sent a notification to the Swedish government regarding its intent to bring a claim under the China-Sweden BIT in relation to a decision of the Swedish telecom regulator which bans the use of Huawei's products in the country's 5G networks. The notification is available at <https://jusmundi.com/en/document/pdf/other/en-huawei-technologies-co-ltd-v-kingdom-of-sweden-notice-of-intent-tuesday-5th-january-2021>, visited on 3 May 2021.

103 This figure is based on information provided by UNCTAD's investment arbitration database, <https://investmentpolicy.unctad.org/investment-dispute-settlement>, visited on 29 April 2021.

104 To use the example of Finland, at the end of 2013, the entire foreign direct investment (FDI) stock in Finland stood at EUR 73,459 million, and investments from countries with

Nordic region, in particular in the mining sector, and this was of course a central reason for why we chose Finland and industrial mining as our case study. This brings us to our conclusions.

The primary goal of this article was to provide initial reflections on whether legitimate public interest measures might be subject to challenge under CETA's investment protection rules and thereby to reflect on three interrelated research questions: How plausible is the EU Commission's assertion that the reformed investment protection rules (in particular those included in CETA) prevent investors from challenging legitimate public interest measures? Is the protection provided under CETA's rules co-extensive with the protection provided under the constitutions of countries placing high on global rule of law rankings? And are countries upholding the rule of law safe from investor claims under the reformed investment protection rules? We have tested these questions by comparing the scope of protection provided against indirect expropriation under CETA and under the Finnish Constitution in the context of industrial mining in Finland. We focused on three legislative reform proposals: restriction/prohibition of mining in and close to nature conservation areas; introduction of a mining tax; and increasing collateral payments.

From our analysis, we derive the following general conclusions. First, there are significant similarities in the protections provided under CETA's indirect expropriation provision and the Constitution of Finland. This is due to a number of reasons. The criteria used to assess indirect expropriation claims are quite similar. The economic impact and duration of the measure and its purpose and proportionality to the legitimate aim pursued are relevant factors under both legal systems, with CETA's police powers provision and Section 20 of the Constitution giving further weight to environmental considerations in the respective proportionality analyses. The restriction/prohibition scenario does not spell out the potential differences between CETA and constitutional property protection in Finland because such legislative change would, in our view, be equivalent to expropriation and compel the payment of compensation under the respective standards of review.[105] In other words, legislative changes that wipe out or neutralize existing property rights and render investments

which Finland had concluded a BIT counted for around 1.3 per cent (or EUR 1,000 million) of the stock, with Russia alone counting for more than eighty per cent of the latter figure. *See* Pekka Niemelä, "Investor-State Arbitration under Fire – Implications of Finland's Bilateral Investment Treaties", *Tidskrift utgiven av Juridiska Föreningen i Finland* (2014:6) pp. 504–545.

105 As the *El Paso* tribunal put it, although "general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a

worthless and untransferable cannot be "saved" by the police powers provision or Section 20.

We also noted that there may be borderline cases where a legislative change is tantamount to expropriation under CETA but not under the Constitution (or vice versa), but at this stage it is difficult to predict the circumstances under which such cases could arise. Conversely, introduction of a mining tax and higher collateral payments should not raise compensation issues, given their basic design and purpose, although, again, compensation claims under CETA remain a theoretical possibility. Although we concluded that compensation should be paid to concerned investors if the restriction/prohibition of mining proposal is adopted, it will be exceedingly difficult to successfully challenge legitimate public interest legislation under CETA when the legislation only decreases the value of specific property rights. Commentators have noted that in the majority of known cases investors have challenged not general legislative measures but specific measures affecting only the claimant investor, with one argument being that non-discriminatory general measures adopted in due process and for a legitimate public purpose were "effectively insulated from censure" (i.e. from compensation claims) already by 2007 after a series of important awards in cases such as *Methanex* v. *United States*.[106] Apart from clearly expropriatory measures, it is clear that CETA's rules will continue this basic trend, if not render such claims altogether futile.

While the examples of mining tax and collateral payments provide no room for compensation claims in our view, legislative changes which affect the value of property rights but fall short of indirect expropriation could be assessed differently by CETA tribunals and the Constitutional Law Committee. As a first matter, investors typically rely simultaneously on the indirect expropriation

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duty of compensation … unreasonable, *i.e.,* arbitrary, discriminatory, disproportionate or otherwise unfair [measures] … can, however, be considered as amounting to indirect expropriation if they result in a neutralization of the foreign investor's property rights". *See El Paso* v. *The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 240–241.

106 *See* A. Sweet, M. Chung and A. Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration', 8:4 *Journal of International Dispute Settlement* (2017) pp. 579–609. Another relevant finding on environmental measures is that over 80 per cent of claims targeting generally applicable environmental measures have been rejected by tribunals. See D. Behm and M. Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration', 18:1 *Journal of World Investment & Trade* (2017) pp. 14–61. As to indirect expropriation claims, Kriebaum noted in 2014 that "in only little more than a dozen cases tribunals have found an indirect expropriation … [and] none of them concerned general regulation by the host State". Kriebaum, 'FET and Expropriation', *supra* note 6, p. 478.

and FET provisions of the applicable investment treaty. If a tribunal finds that the challenged measure is not tantamount to indirect expropriation, it will then analyse its compatibility with the FET standard, which typically has a lower threshold of application in comparison to indirect expropriation provisions. However, CETA's FET provision sets a very high threshold of application in relation to public interest legislation,[107] and it is difficult to see how such legislation, or the attendant decision-making process, could constitute one of the proscribed behaviours listed in the FET provision, at least in countries with highly developed legal systems. Conversely, while the Constitutional Law Committee has held that the state is not obligated to pay compensation for property rights limitations, the question of compensation is a factor to be considered when the Committee assesses whether the limitation is compatible with the Constitution. Moreover, compensation has been granted in connection with a number of rights limitations which have been justified with reference to Section 20 of the Constitution.[108] The criteria that the Committee uses to assess the constitutionality of rights limitations are also less stringent than the criteria under CETA's FET provision, with concepts such as reasonableness, legitimate expectations and foreseeability playing a role.[109] This suggests that investors may receive more favourable treatment under the Finnish Constitution in relation to property rights limitations, given the stringent conditions of application of CETA's FET provision.

To what extent these conclusions apply with respect to the other Nordic countries or developed economies in general is difficult to assess, but we assume that our conclusions *may* have broader relevance for at least two reasons. First, the constitutions of many countries contain a provision similar to Section 20 of the Finnish Constitution.[110] While the wording and legal effect of such provisions vary, they reflect a growing recognition of the importance of

107 *See* footnote 34 and the accompanying text.

108 *See e.g.*, PeVL 20/2010 vp and PeVL 24/2012 vp. Typically, these laws have tightened the criteria under which compensation is available to landowners and other property rightholders for particular costs.

109 Such rights limitations have to, of course, meet the seven criteria discussed above (*see* footnote 47 and the accompanying text).

110 *See e.g.*, Article 112 of the Constitution of the Kingdom of Norway, the first paragraph of which provides that "[e]very person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well."; Article 2.3 (Chapter 1) of the Instrument of Government of Sweden provides that "[t]he public institutions shall promote sustainable development leading to a good environment for present and future generations" (Sweden's Constitution consists of four fundamental laws,

protecting the environment more effectively against the impact of large-scale industrial projects and use of natural resources.[111] This supports the view that when legislative changes are justified with reference to environmental protection, the question of whether such changes amount to indirect expropriation *may* be assessed on the basis of similar type of criteria as in Finland and under CETA. It is clear that in-depth country-specific research is needed to understand to what extent this provisional hypothesis holds water. Second, we also assume that legislative changes neutralizing or wiping out specific property rights require the payment of compensation under most constitutions and in most scenarios, as it does under CETA, regardless of the inclusion of the police powers provision.

When these conclusions are assessed in light of our three research questions, following tentative answers come to mind. CETA's investment protection rules clearly make it difficult to challenge legitimate and non-discriminatory public interest measures adopted in accordance with due process requirements. Despite the different textual formulations and (partly) different evaluative criteria, the scope of protection against indirect expropriations under CETA and under the Finnish constitution are surprisingly similar, even strikingly so. What is more, compensation for constitutional rights limitations may be more easily obtainable under the Constitution, as the fair and equitable treatment provision sets a higher threshold of application than the standards developed in the practice of the Constitutional Law Committee. These remarks do not negate the possibility of situations where compensation claims succeed under CETA but compensation is denied as a matter of domestic law or vice versa, but, generally, CETA's rules bear a close resemblance to constitutional property protection in Finland, particularly with respect to indirect expropriations, and hence provide fodder for the argument that countries such as Finland are (relatively) safe from investor claims under CETA as long as the national legislative procedure honours due process and as long as the standards of constitutional

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the Instrument of Government is one of them); Article of the Charter for the Environment, which was integrated in the French Constitution in 2005, provides that "[p]ublic policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress." For other examples of similar constitutional provisions, *see e*. For other examples of similar constitutional provisions, *see e.g*. T. Field, *State Governance of Mining, Development and Sustainability* (Cheltenham: Edward Elgar, 2019) pp. 59–61.

111 It is of course clear that even if protection of the environment is not included in a constitution, other constitutional provisions and rules of domestic law may provide for similar type of protection.

review protect existing property rights against sudden and radical legislative changes.

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# AUTHOR QUERIES

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